STATE OF MICHIGAN

COURT OF APPEALS

USL IMPROVEMENT ASSOCIATION, Plaintiff-Appellant,	UNPUBLISHED March 13, 2012
v	Nos. 297157; 298080 Oceana Circuit Court
OCEANA COUNTY DRAIN COMMISSIONER, OCEANA COUNTY, and OCEANA COUNTY BOARD OF COMMISSIONERS, Defendants-Appellees.	LC No. 09-008200-CC

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In Docket No. 297157, plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. Plaintiff challenges the portion of the order dismissing its inverse condemnation claims against the Oceana County Drain Commissioner (the "Drain Commissioner"). In Docket 298080, plaintiff appeals by leave granted from the same order, challenging the portion of the order that dismissed its "claim of appeal" from a special assessment for the Holiday Lake Dam in Oceana County, as determined by the Drain Commissioner and approved by the Oceana County Board of Commissioners (the "Board of Commissioners") in November 2009. We affirm.

I. BACKGROUND

Lake Holiday is a private lake located in Oceana County; the lake was created in the 1970s through the construction of a dam to impound water of the Golden Drainage District. The water flows from Lake Holiday into Upper Silver Lake and then to Silver Lake and Lake Michigan. Lake Holiday is regulated pursuant to the Inland Lake Level Act (ILLA), which is contained in current Part 307 of the Natural Resource Environmental Protection Act (NREPA),

MCL 324.30701 *et seq.*[1] In addition, the dam is subject to the Dam Safety Act, which is contained in current Part 315 of the NREPA, MCL 324.31501 *et seq.*[2]

Responsibility for maintaining the Holiday Lake Dam rested with certain property owners, including plaintiff, until 1999, when the trial court determined in a prior action that responsibility for the repair and maintenance of the Holiday Lake Dam shall be with "Oceana County through its Lake Holiday Assessment District." Earlier in 1997, the Board of Commissioners petitioned the trial court for a determination of the normal water level for Lake Holiday and a special assessment district to pay for repairs to the dam. The trial court ordered and adjudged the normal height of Lake Holiday to be 637 feet, which level would be allowed to fluctuate and vary seasonally. The trial court also established a special assessment district, which was ordered to include all parcels having frontage on Lake Holiday and plaintiff's parcel, which was described as the "[s]outh side of the dam as one parcel in the district."

In July 2009, the Michigan Department of Environmental Quality issued an emergency order to the Oceana County Drain Commission and dam owners, including plaintiff, requiring that action be taken to address an imminent danger of the Holiday Lake Dam failing. The order required an immediate draw down of the impoundment of the Holiday Lake Dam to the maximum extent possible to minimize leakage, which was contributing to the erosion of the dam. The impoundment was to remain drawn down until the dam was repaired to a point where it was safe to restore water levels within the impoundment.

In October 2009, the Drain Commissioner determined that repair costs would amount to $404,116. The Drain Commissioner also filed a motion in the prior 1997 action to confirm, for purposes of clarification, the specific parcels included in the Lake Holiday Lake Level District. In addition, plaintiff was given notice that a public review of the Drain Commissioner's proposed apportionment of a special assessment for the repairs would be conducted on November 10, 2009.

Plaintiff filed this action on November 30, 2009, and filed a four-count "Amended Complaint and Claim of Appeal" on December 21, 2009. Counts I and II raised challenges to the Board of Commissioners' alleged approval of the special assessment roll, as determined by the Drain Commissioner in November 2009. Plaintiff relied on Part 307 of the NREPA, MCL 324.30701 *et seq.*, as the basis for its "claim of appeal." In counts III and IV, plaintiff alleged that the Drain Commissioner's entry onto its property and that excavation work involved in the repair of the dam established claims for inverse condemnation and a taking of its property for which it was entitled to compensation.

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[1] The ILLA was repealed in 1994 and reenacted without substantive change as Part 307 of the NREPA. See *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 145; 762 NW2d 192 (2009).

[2] See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 395 n 21; 651 NW2d 756 (2002) (discussing the reenactment of the Dam Safety Act in the NREPA).

On March 2, 2010, the trial court entered an order granting defendants' motions for summary disposition and dismissing plaintiff's "Complaint and Claim of Appeal" with prejudice. Thereafter, on March 23, 2010, plaintiff filed a claim of appeal in this Court in Docket No. 297157. On that same day, plaintiff filed a motion for reconsideration of the March 2, 2010, order in the trial court, and also requested an opportunity to amend its "claim of appeal" with respect to the special assessment decision. The trial court denied both motions. Plaintiff subsequently filed an application for leave to appeal, which this Court granted in Docket No. 298080.

II. STANDARD OF REVIEW

We review de novo a trial court's application of legal doctrines, such as res judicata, and its interpretation of court rules and statutes. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A trial court's ruling on a motion for summary disposition is also reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Further, "[i]nterpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). But decisions concerning the meaning and scope of pleadings are reviewed for an abuse of discretion. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). "A trial court abuses its discretion only when its decision results in an outcome falling outside the range of principled outcomes." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 692; 777 NW2d 511 (2009).

III. DOCKET NO. 297157

Plaintiff argues that the trial court erred in dismissing its inverse condemnation and taking claims, which were based on the Drain Commissioner's entry onto plaintiff's property and the excavation work in connection with the repair and maintenance of the dam. We disagree.

The trial court did not state the subrule under which it granted defendants' motions with respect to the inverse condemnation and taking claims. But because the court considered documentary evidence submitted by the parties and took judicial notice of its files and records from prior actions in granting defendants' motions, we review the trial court's decision under MCR 2.116(C)(10). *Spiek v Dep't of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The motion should be granted if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* at 425.

In an inverse condemnation action, a plaintiff must establish that governmental actions amount to a constitutional "taking" of property. *Dep't of Transp v Tomkins*, 481 Mich 184, 203; 749 NW2d 716 (2008). The Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, prohibit the taking of private property for public use without just compensation. *Cummins v Robinson Twp*, 283 Mich App 677, 706; 770 NW2d 421 (2009). Both temporary and

permanent takings require compensation. *Id.* at 716-717. But there must be a causal connection between the government's actions and the alleged damages. *Id.* at 708. Although a physical taking is not required, in cases involving physical takings required acquiescence is at the heart of the claim. *Yee v City of Escondido*, 503 US 519, 527; 112 S Ct 1522; 118 L Ed 2d 153 (1992). "[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." *Id.*

There is no dispute that the Drain Commissioner entered onto plaintiff's property to repair the dam. Nonetheless, plaintiff has failed to establish any basis for disturbing the trial court's determination that its prior May 25, 1999, order relieved various parties, including plaintiff, of any responsibility for repair or maintenance of the dam by transferring that responsibility to Oceana County. While the trial court interpreted the prior order as implying the creation of an easement for the county's Drain Commissioner to carry out its responsibilities, our determination that summary disposition was appropriate under MCR 2.116(C)(10) is not dependent upon whether the order created an "implied easement" as that phrase is understood in the context of general property law.

"An easement represents the right to use another's land for a specified purpose." *Matthews v Dep't of Natural Resources*, 288 Mich App 23; 792 NW2d 40 (2010). In contrast to a license, which constitutes mere permission to do some act or series of acts on property, the easement is a limited property interest. *Dep't of Natural Resources v Camody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005); *Kitchen v Kitchen*, 465 Mich 654, 659; 641 NW2d 245 (2002). Plaintiff also correctly asserts that an "implied easement" is understood as arising by necessity. In the context of property law, it is understood to arise "only when the land on which the easement is sought was once part of the same parcel that is now landlocked." *Tolksdorf v Griffith*, 464 Mich 1, 10; 626 NW2d 163 (2001).

But whether an "easement" in the formal sense could be implied from the trial court's May 25, 1999, order, such as to grant the Drain Commissioner a limited property interest in plaintiff's land to access and repair the dam, is not material in determining whether a compelled physical invasion of plaintiff's property occurred. It is sufficient that the Drain Commissioner was granted permission to enter plaintiff's property to perform certain acts. This is an obvious implication of the trial court's May 25, 1999, order relieving plaintiff of any responsibility for repairing or maintaining the dam, and transferring that responsibility to Oceana County.

If plaintiff did not want to be relieved of that responsibility, it should have appealed the May 25, 1999, order or taken steps to restore that responsibility. Given the lack of evidence that plaintiff did anything to reacquire responsibility for repairs and maintenance, we conclude that plaintiff failed to demonstrate a genuine issue of material fact regarding whether the Drain Commissioner's entry onto its property, or use of the property for repairs and maintenance of the dam, was a compelled physical invasion.

The doctrine of acquiescence relied upon by the Drain Commissioner supports this conclusion. The doctrine, which is a form of estoppel, has been described as follows:

> "It may be stated as a general rule that if a person having a right, and seeing another person about to commit, or in the course of committing, an act

> infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, it has been said, is the proper sense of the term 'acquiescence,' which, in that sense, may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." [*Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450; 137 NW 305 (1912), quoting 11 Am. & Eng. Enc. Law (2d ed), p 428.]

The doctrine was applied in *Lenawee Co Bd of Comm'rs v Abraham*, 93 Mich App 774; 287 NW2d 371 (1979), to preclude property owners from denying access to their land for repairs and improvements, where they failed to contest or appeal proceedings under the former ILLA to determine and maintain lake levels. We similarly conclude that it is appropriately applied here, given that no genuine issue was shown by plaintiff with respect to its acquiescence to the Oceana County Drain Commissioner taking over responsibility for repair and maintenance of the dam.

In sum, while the trial court might have misused the term "easement" when describing the Drain Commissioner's permission to enter plaintiff's property for maintenance and repairs, as clearly implied in the prior May 25, 1999, order, the court reached the correct result in finding no factual support for plaintiff's inverse condemnation and taking claims involving whether there was a compelled physical invasion. This Court will affirm a trial court's decision where the trial court reaches the right result. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

The other arguments presented by plaintiff with respect to the inverse condemnation and taking claims also do not establish any basis for relief. Contrary to what plaintiff argues, the record does not indicate that the trial court relied on the doctrine of res judicata to conclude that plaintiff was precluded from challenging the entry onto its property,[3] and that doctrine is immaterial to our determination that the trial court reached the right result in granting defendants' motions for summary disposition. And to the extent that plaintiff suggests that a question of fact existed regarding whether the Drain Commissioner caused a physical taking by exceeding the scope of its responsibilities, we note that MCR 2.116(C)(10) requires the party opposing a motion for summary disposition to "set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden*, 461 Mich at 121. Here, plaintiff showed only that the current repair work is greater than past repair work. This was insufficient to establish a genuine issue of material fact with regard to whether the work being performed exceeded the scope of the Drain Commissioner's repair and maintenance responsibilities.

Lastly, we reject plaintiff's argument that summary disposition was premature. Plaintiff failed to show that further discovery stood a fair chance of uncovering factual support for its

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[3] Res judicata bars a subsequent action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Estes*, 481 Mich at 585, quoting *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009); *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006); see also MCR 2.116(H); *Coblentz*, 475 Mich at 570-571. Therefore, we affirm the trial court's summary disposition ruling with respect to both "taking" counts in plaintiff's "Amended Complaint and Claim of Appeal."

IV. DOCKET NO. 298080

In Docket No. 298080, plaintiff challenges the trial court's dismissal of the "claim of appeal" that, according to the allegations in count I of the "Amended Complaint and Claim of Appeal," was based on Part 307 of the NREPA.

Before considering plaintiff's arguments, we briefly consider the joint argument of Oceana County and the Board of Commissioners regarding the trial court's subject-matter jurisdiction to consider the appeal. Defects in subject-matter jurisdiction may be raised at any time. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002). But contrary to the argument of Oceana County and the Board of Commissioners, subject-matter jurisdiction over plaintiff's appeal does not rest with the Michigan Tax Tribunal. MCL 324.30714(4) provides that "[t]he special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval." "Court" means "a circuit court, and if more than 1 judicial circuit is involved, the circuit court designated by the county board or otherwise authorized by law to preside over an action." MCL 324.30701(c). Because the trial court in this case is the Oceana Circuit Court, it had jurisdiction to consider plaintiff's appeal.

Nonetheless, a court is not bound by a party's choice of labels for its actions because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of an action is determined by considering the entire claim. *Maiden*, 461 Mich at 135. As a whole, plaintiff's "Amended Complaint and Claim of Appeal" purports to combine multiple constitutional claims and a claim of appeal from a Board of Commissioners decision in a single action, notwithstanding that a civil action and an appeal each require a filing fee to invoke the trial court's jurisdiction. See MCL 600.2529(1); cf. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009) (filing of claim of appeal and entry fee is necessary to vest this Court with jurisdiction in an appeal, and merely arguing that a trial court erred in awarding postjudgment attorney fees, which themselves are appealable as of right, in an appeal from the judgment is insufficient to invoke this Court's review of the attorney fees).

Indeed, the "summons and complaint" document filed by plaintiff with the original "Complaint and Claim of Appeal" was based on the rules governing pleadings for civil actions. A claim of appeal is not a "pleading" under the rules governing civil action in MCR 2.101 *et seq.* See MCR 2.110; *Houdini Props, LLC v City of Romulus*, 480 Mich 1022; 743 NW2d 198 (2008). The "Amended Complaint and Claim of Appeal" itself contains a demand for "trial by jury on all counts in this matter." Plaintiff made this demand, notwithstanding its allegation that it was claiming an appeal under Part 307 of the NREPA.

Examined as a whole, the trial court did not err in ruling that plaintiff failed to properly file an appeal. We reject plaintiff's argument that dismissal was inappropriate because MCR

7.105 does not apply to an appeal from the Board of Commissioners' approval of the special assessment roll. In reaching this conclusion, we disagree with the Drain Commissioner's argument that plaintiff's concession in its response to defendants' motions that MCR 7.105 applies constitutes a judicial admission. A judicial admission is a formal concession in pleadings or stipulations that have the effect of withdrawing factual issues in a case. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996). Here, plaintiff conceded only the applicability of a procedural rule, with the exception of the service requirement for the Attorney General.[4] But while a party is generally precluded from seeking redress in an appellate court "on the basis of a position contrary to that taken in the trial court," *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997), plaintiff has not established any basis for relief even if we were to ignore plaintiff's concession.

We agree with plaintiff that MCR 7.105 is not explicitly applicable to an appeal under Part 307 of the NREPA. But considering that there is no applicable rule in MCR 7.101 *et seq*. and this Court's determination in *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 149-150; 762 NW2d 192 (2009), that MCR 7.105 is the "most applicable court rule" for an appeal to the circuit court under Part 307 of the NREPA, use of the procedures contained in that rule are appropriate. However, a court should take care in evaluating the applicability of particular provisions of the rule.

We agree with plaintiff that MCR 7.105(D), the provision providing for service on the Attorney General, would not be applicable to an action under Part 307 of the NREPA. Court rules are construed under legal principles applicable to statutes. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). "When the language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id*. Here, the service requirement in MCR 7.105(D) is directed at the specific agencies covered by the rule. MCR 7.105(D) provides, in part, that "[p]romptly after filing the petition for review, the petitioner shall serve true copies of the petition for review on the agency, the Attorney General, and all other parties to the contested case in the manner provided by MCR 2.107, and promptly file proof of service with the court." The required service on the Attorney General is consistent with the Attorney General's duty to provide legal services to the state of Michigan and its agencies, boards, commissions, officials, and employees. See generally *Attorney General v Pub Serv Comm*, 243 Mich App 487, 496; 625 NW2d 16 (2000). While the Attorney General is also authorized to intervene in any action necessary to protect the rights or interests of the state under MCL 14.101, *In re Certified Question*, 465 Mich 537, 544-545; 638 NW2d 409 (2002), because the amount of a special assessment is a matter of local concern under Part 307 of the NREPA and the Attorney General does not provide legal services to the Board of Commissioners, the trial court erred as a matter of law in determining that MCR 7.105(D) should be applied to require service on the Attorney General in an appeal governed by MCL 324.30714(4).

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[4] We recognize that plaintiff challenged the applicability of MCR 7.105 in its motion for reconsideration of the trial court's decision to dismiss the "Complaint and Claim of Appeal." Because plaintiff does not address that decision, we shall not consider it. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Nonetheless, MCR 7.105(J)(2)(b) provides for dismissal of an appeal when it is not taken or pursued in conformity with the rules, and the deficiencies in plaintiff's "Amended Complaint and Claim of Appeal" go beyond the dispute concerning MCR 7.215(D). Here, plaintiff did not file with its "Complaint and Claim of Appeal" a copy of the Board of Commissioners' decision for which review was sought, or explain why it was not attached. MCR 7.105(C)(3). And given plaintiff's concession during the motion proceedings that MCR 7.105 applies, one could have expected plaintiff to at least attempt to file a petition for review that complied with MCR 7.105, separate and apart from the civil action, with the appropriate filing fee. Plaintiff's presentation of a "claim of appeal" as simply counts of a civil action was insufficient to invoke the trial court's appellate jurisdiction. Therefore, we uphold the trial court's decision to dismiss the "claim of appeal."

We are also not persuaded that plaintiff has established any basis for disturbing the trial court's decision denying plaintiff's motion to amend the "claim of appeal" in order to bifurcate it from the inverse condemnation claims and present it as a separate proposed "petition for review." The trial court relied on multiple grounds to deny the motion, including its lack of jurisdiction to consider the motion in light of the appeal filed in Docket No. 297157. Because plaintiff failed to properly invoke the trial court's appellate jurisdiction and the order appealed in Docket No. 297157 disposed of the entire civil action, we agree with the trial court that it lacked jurisdiction to consider the motion. MCR 7.208(A); *Wiand v Wiand*, 205 Mich App 360, 369-370; 522 NW2d 132 (1994). Furthermore, considering plaintiff's failure to file an appeal under any rule, we reject plaintiff's argument that it should have been allowed to "amend an appeal" using the procedure in MCR 7.105(B)(2). Accordingly, even if the trial court had jurisdiction to consider the motion, we find no basis for reversing its decision denying the motion.

Lastly, considering that plaintiff does not argue that it had a cause of action to set aside the special assessment independent of the appeal, we decline to consider plaintiff's argument that it was denied due process. Had plaintiff filed a proper appeal from the Board of Commissioners' approval of the special assessment roll, the trial court could have conducted a formal review of the proceedings, including whether the amount of its assessment was arbitrarily determined. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App at 151. While the trial court nonetheless gave some consideration to this matter for plaintiff's benefit during the proceedings, absent a proper appeal we have nothing to review.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey